RETURN DATE: November 22, 2016	:	SUPERIOR COURT
CONNECTICUT STATE EMPLOYEES ASSOCIATION, SEIU LOCAL 2001 (CSEA)	:	JUDICIAL DISTRICT OF HARTFORD
and NEW ENGLAND HEALTH CARE EMPLOYEES UNION, DISTRICT 1199, SERVICE EMPLOYEES INTERNATIONAL UNION (1199)	:	
PLAINTIFFS	:	
v.	:	
STATE OF CONNECTICUT DEPARTMENT OF DEVELOPMENTAL SERVICES (DDS), MORNA A. MURRAY, BENJAMIN BARNES	:	
DEFENDANTS	:	OCTOBER 13, 2016

PRE-HEARING MEMORANDUM IN SUPPORT OF

PLAINTIFFS' APPLICATION FOR TEMPORARY INJUNCTION

PRELIMINARY STATEMENT

The Plaintiffs, Connecticut State Employees Association, SEIU Local 2001 ("CSEA") and New England Health Care Employees Union, District 1199, Service Employees International Union ("1199"), by and through the undersigned counsel, hereby submit this Memorandum of Law in support of their application for temporary injunctive relief against Defendants, Department of Developmental Services ("DDS"), Morna A. Murray, and Benjamin Barnes. The Plaintiffs filed an application for an injunction seeking temporary injunctive relief, enjoining the Defendants from laying off Plaintiffs' members and contracting out their work, until the State Board of Labor Relations ("SBLR" or "the Board") has resolved the Plaintiffs' prohibited practice

complaint under C.G.S. §5-272 ("SPP" attached as Exhibit 1 to the Verified Complaint). Below, the Plaintiffs demonstrate that the unilateral decision to subcontract bargaining unit work in order to layoff is an unlawful act. Therefore, there is a strong probability that they will prevail on their action before the State Board, that the balance of equities strongly favors restraining the Defendants from committing their unlawful actions, and that the Plaintiffs will be irreparably harmed unless this Court acts.

I. FACTS

The Plaintiffs, Connecticut State Employees Association, SEIU Local 2001 and New England Health Care Employees Union, District 1199 ("the Unions"), are the exclusive bargaining representatives of employees in the P-3B, P-1 and NP-6 state employee bargaining units. Specifically, CSEA represents institutional educators in the P-3B bargaining unit, and 1199 represents professional health care workers in P-1 and para-professional health care workers in NP-6.

The Defendant, State of Connecticut Department of Developmental Services ("DDS") is a public agency of the State of Connecticut, within the Executive Branch. The Defendant, Morna A. Murray, is its Commissioner. The Defendant, Benjamin Barnes, is the Secretary of the Office of Policy Management, who is the designated employer representative for collective bargaining for DDS under Connecticut General Statutes § 4-65a. DDS currently runs the Southbury Training School, five (5) Regional Centers and 62 Community Living Arrangements ("CLAs" or "group homes") throughout the State, and employs state workers who provide Independent Supports and Services to individuals residing independently in their own homes or apartments. The Southbury Training School, a state entity located in Southbury, Connecticut, was built in the 1930's

as a home for individuals with intellectual disabilities and is the only large such residential facility in the state. The Regional Centers are congregate living facilities certified by the Department of Public Health. The Community Living Arrangements (group homes) are small community residences licensed and operated by DDS. Independent Supports (formerly known as Supported Living Services) are supports and services provided to individuals residing in their own homes or apartments.

The Defendant DDS currently employs more than 160 members of the P-3B bargaining unit, including 68 members working as Developmental Services Adult Services instructors. DDS currently employs members of the P-1 and NP-6 bargaining units, including more than 2,000 members providing professional and para-professional health care and support services at the Southbury Training School, the Regional Centers, 62 state-operated and licensed CLAs and to individuals residing independently.

The Plaintiffs' members have a range of responsibilities including, but not limited to:

> *Instructors*: Providing job support and education for people with developmental disabilities, developing and implementing training programs, educating staff in best practices consistent with federal and state licensing requirements and DDS policy, processing rent subsidy applications, overseeing quality assurance, working with community companion homes, and working with private providers to ensure appropriate services are being delivered.
>
> *Professional Health Care Workers*: Direct professional health care and rehabilitative services (Nursing, Occupational Therapy, Physical Therapy, Speech Therapy and Dentistry) and interacting with individuals in delivering, planning, and evaluating the coordination, assessment and monitoring of such health and rehabilitative services; consulting with community health care providers, private residential day program providers, and families to ensure appropriate delivery and level of services depending on the particular needs of each client.
>
> *Para-professional Health Care Workers*: The para-professional health care workers' responsibilities include, but are not limited to: providing direct services

> to clients living in a community setting by monitoring client caseloads associated with residential programs; providing assistance and instruction to clients in activities of daily living; participating in therapeutic programs and providing guidance to clients concerning the development of desirable personal habits such as those related to hygiene and social relationships; the serving and feeding of meals; reinforcing appropriate client behavior through clinically approved modification techniques; ensuring clients receive their correct medication by administering and tracking delivery; evaluating and monitoring performance of residential program units and staff consistent with client needs.

Moreover, the Plaintiffs' members are trusted friends, advocates and caretakers to the individuals that DDS serves – many of whom have been working with individuals in the homes and centers for years, even decades. Changing teachers and providers for these individuals has significant negative clinical effects.

The Plaintiffs and Defendant State of Connecticut DDS are parties to two distinct collective bargaining agreements establishing wages, benefits and working conditions ("CBAs" or "Agreements") – one agreement concerns the terms and conditions of P-3B bargaining unit members and the other covers both P-1 and NP-6 bargaining unit members. The contracts were effective from July 1, 2011 through June 30, 2016 - although the prevailing terms and conditions of employment remain in effect pursuant to the State Employee Relations Act, C.G.S. §5-270 et seq. ("SERA"). These contracts have expired, and the parties are currently bargaining their successor agreements. Under SERA, the parties are obligated to bargain over all material conditions of employment.

The subcontracting of bargaining unit work is a material condition of employment, and subcontracting has existed in all three bargaining units for many years. However, DDS has never before laid off bargaining unit employees as a consequence of

subcontracting.[1] The record will clearly reveal (upon a hearing on this application) that DDS has refused and failed to bargain with the respective Unions over its decision to lay off approximately four-hundred and ninety-two (492) of Plaintiffs' members and transfer their work to private providers. Further, the record will reveal that the Plaintiffs timely protested the Defendants' decision, sought to bargain over that decision, and was rebuffed in those efforts, and that the Defendants persist in their plans despite the Unions' challenge to those plans before the State Board of Labor Relations, and this Court.

The Layoffs as a Direct Consequence of Privatization

On August 16, 2016, the Commissioner of DDS, Morna A. Murray, in a memorandum to Secretary Benjamin Barnes announced that DDS will lay off a total of four-hundred and ninety-two (492) state employees. DDS will lay off approximately sixty-eight (68) CSEA members "after September 1, 2016" and will lay off approximately four-hundred and sixteen (416) 1199 members "after January 1, 2017." The Defendants have indicated that all of the individuals cared for by these workers and, all or substantially all, of the work of the laid off workers will be sub-contracted to private sector employees. DDS's plan to lay off bargaining unit members and privatize their work includes a plan to close 30 group homes, multiple Regional Centers, and also privatize Day Support Programs offered in those facilities.

[1] The expired Agreements contained substantive prohibitions against laying off as a direct result of contracting out, although those provisions had a sunset clause which limited them to the period of the respective CBA. When the parties do reach a new collective bargaining agreement, it may well, like the expired Agreements, include an express prohibition on laying off as a direct result of contracting out. What is at issue here, however, is not the express language of the CBAs setting the material conditions of employment, but the Employer's refusal to even bargain over a material condition of employment that it has unilaterally chosen to change.

DDS has issued a Request for Proposal ("RFP") for proposals from qualified DDS residential providers to assume administrative oversight of twenty-eight (28) of the state run group homes currently operated in the West, North and South Regions. On August 30 and 31, 2016, DDS held RFP conferences in Meriden, Connecticut for private providers. DDS has legal and practical obligations to the individuals living in the facilities and will be required to promptly contract out bargaining unit work to meet the needs of the individuals as they are removed from the facilities and congregate living facilities.

The Threat of Irreparable Harm

Upon privatizing the work, DDS will lose the capacity to deliver the services Plaintiffs' members currently perform and will also not be able to later reverse the unilateral change because the individuals impacted by the decision will have long settled into their new routines. Therefore, the Unions will be unable to protect their members from DDS's unlawful unilateral action unless immediate relief is granted to halt the imminent contracting out of bargaining unit work.

Moreover, DDS has acknowledged the additional disruption to the individuals being cared for that is certain to ensue as a consequence of the transfer of work. If the prohibited practice proceedings (and potential subsequent judicial review) are allowed to run their normal course, by the time the Board renders a decision, the bargaining unit work at issue will have long been subcontracted to private providers. The Board's normal *status quo* remedial authority would then require it to disrupt these individuals' care *again,* and would lead to clinically significant issues again.

Therefore, the Unions will be effectively deprived of a remedy when they prevail in the SPP case because reversing the State's decision would require inflicting widespread harm to the innocent individuals that DDS serves.

The Prohibited Practice Complaint and The Request to Withhold Implementation Until the Board Rules

On October 11, 2016, the Unions filed their SPP with the SBLR (attached as Exhibit 1 to the Verified Complaint). The SPP alleges that the Employer will unilaterally make a change to a mandatory subject of bargaining in violation of § 5-272 by failing and refusing to bargain with the Unions over its decision to subcontract and transfer bargaining unit work. However, the Board will not be able to render a decision on this matter until after the layoffs occur and the contracting out of the bargaining unit work has been finalized and the Defendants have refused to commit delaying implementation until the Board has ruled. By that time, the individuals that the bargaining unit workers currently serve will have adapted to new homes and caretakers. The Unions have both before and after filing the application for a temporary injunction requested from the Defendants their consent to an expedited process before the Board and their commitment to withhold implementation until the Board rules. Notably, on October 11, 2016, the Unions' counsel sent a letter to DDS' counsel, Undersecretary for Labor Relations, Lisa Grasso Egan, requesting a promise not to implement this decision until after the SBLR has ruled on the SPP, or at the least, an agreement to expedite the hearing pursuant to Section 5-237-29 of the Board's regulations. The Defendants have heretofore failed to provide any such commitment.

II. LEGAL STANDARD

This Court has general equitable authority under C.G.S. §52-471 to grant and enforce an injunction. To obtain a temporary injunction, normally a plaintiff must show: "(1) probable success on the merits of their claim; (2) irreparable harm or loss; and (3) a favorable balancing of the results or harm which may be caused to one party or the other, as well as to the public, by the granting or denying of the temporary relief requested." Fleet Nat. Bank v. Burke, 45 Conn. Supp. 566, 570, 727 A.2d 823, 826 (Super. Ct. 1998), citing Griffin Hospital v. Commission on Hospitals & Health Care, 196 Conn. 451, 457-58, 493 A.2d 229 (1985). Since the underlying matter is a "labor dispute," however, the legislature has provided careful guidance as to what is needed to grant a *status quo* injunction.

C.G.S. §31-115 provides in relevant part:

> No court shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, except after [an adversarial hearing and] a finding of facts by the court, to the effect: (a) That unlawful acts have been threatened and will be committed by a person or persons unless such person or persons are restrained therefrom... (b) that substantial and irreparable injury to the complainant or his property will follow; (c) that as to each item of relief granted greater injury would be inflicted upon the complainant by the denial of relief than would be inflicted upon the defendants by the granting of relief; (d) that the complainant has no adequate remedy at law; and (e) that the public officers charged with the duty to protect the complainant's property are unable or unwilling to furnish adequate protection.

Since a prohibited practice under state labor law is an "unlawful act," it is therefore properly the subject of an injunction that can be issued by this Court under §31-115 provided that the rest of the §31-115 standards are met. See Local 818 of Council 4 AFSCME, AFL-CIO v. Town of E. Haven, 42 Conn. Supp. 227, 233, 614 A.2d

1260, 1264 (Super. Ct. 1992) ("Commission of an unfair labor practice by statute constitutes an 'unlawful act' within the meaning of §31-115").

The Local 818 court also found the employer's prohibited practices to threaten irreparable harm. Id. at 1267. (Irreparable harm to a union occurs where the union's strength and credibility would be undermined if it is unable to prevent loss of members' employment as a consequence of a clear prohibited practice). See also Int'l Ass'n of Firefighters, Local 834 v. Bridgeport Civil Serv. Comm'n, Superior Court, judicial district of Fairfield, Docket No. CV95-302995 (February 9, 1995) (1995 Conn. Super. LEXIS 441, at *10), citing Local 818, supra. ("Damage to the strength and credibility of a union is irreparable injury for which an injunction can issue.)" Compare City of Waterbury v. Connecticut Alliance of City Police, Superior Court, judicial district of Waterbury, Docket No. UWYCV146024514S (December 10, 2014) (2014 Conn. Super. LEXIS 3078, at *10) (§31-115 does not confer jurisdiction because "there [was] no claim of a prohibited practice or unfair labor practices that may be the subject of an injunction [under §31-115].") The Plaintiffs demonstrate below that all of the §31-115 standards are easily met in this case, and that irreparable harm is threatened not just to the Unions, but to the members whose jobs will be lost as well as to the public they serve.

III. ARGUMENT

A. The Defendants' Plan is an Unlawful Act and the Unions are highly likely to succeed on the merits before the Board

DDS is required to bargain with the Unions over its decision to contract out bargaining unit work. Norwalk Board of Ed., SBLR Decision No. 2854 (1990). It is a prohibited practice under C.G.S. §5-272 to unilaterally contract out bargaining unit work

which is a mandatory subject of bargaining. Where some bargaining unit work has historically been contracted out – as is the case here – the duty to bargain occurs when the Employer seeks to change the scope or nature of the contracting out. City of New Britain, SBLR Decision No. 3290 (1995). There can be little doubt that the Board will find that terminating people's employment in order to contract out is substantially different in kind and degree from subcontracting as an adjunct to work in the bargaining unit.

> In order to prove a prima facie case of unlawful subcontracting or transfer of work, the Union must show that (1) the work in question is bargaining unit work; (2) the subcontracting or transfer of work varied significantly in kind or degree from what had been customary under past practice; and (3) the alleged subcontracting or transfer of work had a demonstrable adverse impact on the bargaining unit.

City of Bridgeport, SBLR Decision No. 4386, 7 (2009). Here, there can be no dispute that the work in question is bargaining unit work. In terms of significant variation in kind or degree, irrespective of any prior contracting out or assignment of unit work by DDS, it has never before engaged in this type of wholesale transfer of bargaining unit work which effectively eliminates a sub-unit of each respective bargaining unit and most significantly which terminates bargaining unit employees. Therefore, the Unions can clearly demonstrate that DDS's unilateral actions vary "significantly in kind or degree from what had been customary under past practice." Id. Finally, DDS cannot refute the severe adverse impact its decision has on the Unions. The Board has consistently recognized that layoffs and "practice[s] that generate fears of future encroachment upon bargaining unit work" are adverse impacts – both are present here in droves. See City of New Britain, supra, at 37 (1995). See also City of Bridgeport, *supra*, at 8 (SBLR recognized the overlap between the work performed by Park Police and City Police in

distinct bargaining units, but found the layoff of the Park Police force constituted a "wholesale transfer of Park Police work var[ying] both in kind and degree from what ha[d] been customary between the Park Police and City Police.")

The Board has made clear that in evaluating subcontracting and transfer of work cases, "[t]he first and most basic tenet worth reiterating is that subcontracting is a mandatory subject of bargaining." City of New Britain, at 8. In view of the well-established and fundamental principles under state labor law, and the facts of this case, the Unions have a high probability of success in prevailing before the SBLR on the SPP complaint and therefore it is clear that the Defendants threaten to commit an "unlawful act" as required by §31-115.

B. Defendant's actions threaten irreparable harm, greater injury upon the Plaintiffs if relief is denied, and the frustration of the SBLR's ability to formulate an effective remedy

As discussed in the Unions' verified complaint, and herein, laying off bargaining unit members and contracting out services they provide will irreversibly eliminate the Defendants' capacity to deliver those services because the work will have been wholly privatized and the individuals the employees care for will have settled into new homes and/or adapted to new caretakers.

It is regrettable that the State's plan - hastily prepared under the guise of fiscal imperative – will have a profound impact on innocent individuals, their family members, and the dedicated public servants who care for them. The State's decision to layoff these valued employees and transfer to private providers the individuals cared for and educated by the members of the Unions will disrupt their care and lead to clinically significant

issues due to the relationships such individuals form with their long term caregivers. It would be still more clinically disruptive to allow such initial disruption to occur, and then to subsequently undo that change years later when the normal course of the SBLR proceedings and potential judicial review is completed. Therefore, the Unions will effectively be unable to protect their members when they prevail in their SPP case because reversing the State's decision would require inflicting widespread harm to the innocent individuals whom DDS serves. Absent a binding promise from the State that it will hold off on its privatization plan (or an injunction being ordered by this Court), the proceedings before the SBLR will be rendered a hollow formality.

Any adequate remedy at law would require the Board to order the reinstatement of the laid off workers to their former positions. Such adequate relief would cause widespread harm to the innocent individuals DDS serves who would be forced to upend their lives *again* as a consequence of DDS' unlawful actions. Therefore, as a practical matter and in order to avoid significant harm to these innocent non-parties, the Board will not command adequate relief and the Plaintiffs will be both irreparably harmed, and effectively deprived of any adequate remedy at law.

This makes the irreparable harm here even more compelling than that found sufficient to meet the irreparable harm requirement in Local 818 of Council 4 AFSCME, AFL-CIO v. Town of E. Haven, 42 Conn. Supp. 227, 233, 614 A.2d 1260, 1264 (Super. Ct. 1992) and Int'l Ass'n of Firefighters, Local 834 v. Bridgeport Civil Serv. Comm'n, Superior Court, judicial district of Fairfield, Docket No. CV95-302995 (February 9, 1995) (1995 Conn. Super. LEXIS 441, at *10). In those cases, the Board would have been able to issue normal make-whole relief and it was only the institutional harm to the

Unions that could not be remedied absent an injunction. Here, while this is equally true, irreparable harm is still more clearly threatened, because the Board's normal ability to issue make-whole relief is constricted by the damage it would do to innocent third parties who will already have suffered more than enough if the injunction is not granted.

The balance of equities here also clearly favors the granting of the injunction. Denying the injunction would allow the State to proceed with its plan for the wholesale involuntary transfer of the most vulnerable recipients of state services. The Unions may not have direct legal standing to assert the rights of the people its members serve; at least one family member is asserting those in a separate proceeding, Mathews, Guardian and Next Friend v. Department of Developmental Service *et al.*, Superior Court, Judicial District of New Haven, Docket No. NNH-CV6-6064753-S (Pending Litigation). However, those rights are relevant in a balance of equities. While the Unions and their members face significant and irreparable harm, on the other side, the State has little to lose by a delay sufficient to allow the Board to rule. And given their statutory and constitutional obligations to protect the developmentally disabled, the avoidance of the clinical harm caused by the threatened multiple treatment disruptions is actually a *benefit* to the Defendants which far outweighs any claimed harm a delay might cause. This is especially true as the Union has offered to expedite the SBLR process so as to get an answer as soon as it can possibly occur. These are powerful, yet fragile, working relationships built on dedication and trust that the bargaining unit employees have fostered. The State, the Unions, the members, and the people they serve all benefit from avoiding the potential for irremediable disruption that could occur if

the injunction is denied. This far outweighs the inconvenience to the State from delaying its unilateral plans until the Board can rule.

C. The State actors charged with ensuring the Employer's compliance with state labor law are unable or unwilling to protect the Plaintiffs from the unlawful act

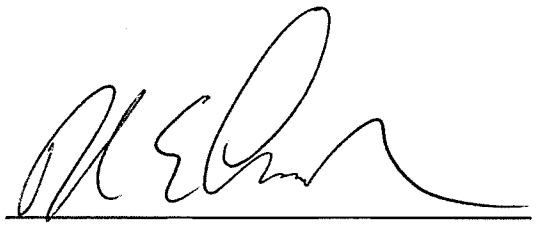
Finally, under §31-115, the Unions must show "that the public officers charged with the duty to protect the [Unions'] property are unable or unwilling to furnish adequate protection." Here, state and local law enforcement have no authority to protect the Unions from the Employer's unlawful prohibited practice, and thus, are unable to do so. Meanwhile, the public officers actually responsible for ensuring that the Defendants meet their obligations under state labor law (public officials within DDS and the Office of Labor Relations) are the very officers who are violating the law, and thus are "unable or unwilling to furnish adequate protection."

IV. CONCLUSION

In view of the facts and arguments made herein, and following an appropriate adversarial hearing, the Plaintiffs respectfully urge the Court to grant the temporary injunction, preventing the Defendants from implementing the plan to layoff bargaining unit members and subcontract their work until the State Board of Labor Relations has resolved the Plaintiffs' prohibited practice complaint.

Respectfully submitted,

The Plaintiffs,
Connecticut State Employees Association,
SEIU Local 2001
and
New England Health Care Employees Union,
District 1199, Service Employees International
Union

By: 

Daniel E. Livingston
Zachary L. Rubin
Livingston, Adler, Pulda, Meiklejohn
& Kelly, P.C.
557 Prospect Avenue
Hartford, CT 06105-2922
Juris No. 100758